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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 14 1977

Memorandum

To: Deputy Secretary of State Charles W. Robinson, Chairman, NSC Under Secretaries Committee

Subject: Deep Seabed Mining Legislation

This memorandum responds to your request of January 3, 1977, for agency concurrence in the submission of the draft report on deep seabed mining legislation to the President for use in the transition to a new Administration. It should be recalled that, in a memorandum to you on December 28, 1976, I stated my view that a virtually identical version of the subject options paper did not represent a suitable vehicle for decision-making and should be remanded for improvement to the Law of the Sea Task Force. For the same reasons, I do not support the forwarding of the report to the President for use as a transition document.

Recognizing, however, that insufficient time remains for the preparation of a completely revised report providing the views of the current Administration on this subject, I will set forth in some detail the substance of the improvements which the Department of the Interior believes necessary to make the present draft a useful description of the problems raised by the question of ocean mining legislation and an accurate representation of this Department's views.

Our key difficulty with the present paper is that it fails to acquaint the reader with the relative importance to United States minerals interests of the development of a domestic deep seabed mining capability and does not address the question of how legislation may protect these interests by reducing present uncertainties affecting ocean mining investments made prior to the entry into force of a treaty. Instead, the analysis concentrates almost exclusively on how legislation may be used to promote the law of the sea negotiations. In our view, legislation can be appropriately designed to serve both objectives, but it is not possible

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to present a reasoned analysis of the legislation issue if one of the two principal objectives--provision for the protection of investments made prior to a treaty--is relegated to an annex and inadequately discussed.

With respect to a description of the importance to the United States of a domestically-based ocean mining industry, I would suggest that the paper include the following information:

> The U.S. is highly dependent on imports of three of these four metals, our imports of cobalt and manganese averaging around 98-99% of annual consumption and our nickel imports around 70% of consumption. Net imports of copper are also representing an increasing share of our consumption. With the exception of nickel, major foreign suppliers of these metal imports are developing countries, where investment stability is unpredictable. Even for nickel, increasing dependence on developing country suppliers has occurred in recent years, and this trend is expected to continue.
>
> With the commencement of currently planned U.S. ocean mining, this dependence would be reduced significantly. By 1985, seabed production could reduce our annual minerals imports expenditures by around $1 billion and satisfy all U.S. cobalt demand, reduce nickel imports by more than two-thirds and manganese ore imports by more than one-third, and sizably decrease copper imports. By 2000, the United States could be virtually self-sufficient for these minerals. Ocean mining promises not only to decrease our dependence on foreign sources of supply but also to lead to reduced prices for nickel, cobalt and possibly manganese to American consumers. In addition, ocean mining technology will have spin-off benefits for other marine activities.

With respect to the basic problem of ocean mining investment instability, I believe the issue can briefly be described as follows:

> United States dependence on private enterprise to supply raw materials means that there must be a stable investment climate in order for it to realize the potential benefits of ocean mining. Over the long term, maximum political and economic stability can

best be achieved through a widely recognized international agreement. But it is not now possible to predict whether an acceptable agreement on deep seabed issues is achievable and, if so, how long it may take to be negotiated. In the interim, private enterprise's commitment to proceed with the development of a capability to mine the deep seabeds may be affected by protracted uncertainty about future investment conditions. The potential for this negative impact is particularly serious over the next year, as American ocean mining companies are on the verge of sizably increasing their annual development expenditures to keep pace with commercial timetables.

The crux of present investment instability is that investments made prior to the entry into force of a treaty may be impaired by the operation of the treaty. The realization under a treaty regime of the expectations upon which prior investments were based depends on the acquisition of a right not only to continue planned operations once the treaty comes into force (under terms and conditions that permit profitable operations), but also to proceed with development of the same specific ore deposit on which millions of dollars have been spent in exploration. This latter requirement arises because substantial portions of the prior investment will have been devoted to detailed exploration and mapping of a particular site and to design and testing of mining systems and metallurgical processing techniques tailored to the particular topography, sedimentology and nodule chemistry of a specific ore body. Given the obvious gulf between the deep seabed positions of the United States and of the developing countries in the negotiation today, it is not possible to predict with any degree of confidence that a future treaty will in fact meet these requirements for investment security.

Accordingly, the American ocean mining industry is pressing for legislation that would create investment security by granting them rights to mine specific deposits and establishing government insurance and guarantees against investment losses caused by a future treaty. The industry justifies the need for legislation on two grounds: that it will be forced to abandon ocean mining projects unless the United States acts now to assure potential investors and that legislation will help us achieve a treaty

acceptable to Congress. There may be no way to verify industry's claim that it has reached the point where it cannot continue under present uncertainties, but the problems raised by this claim deserve careful attention, since the principal benefits of deep seabed resources will only be available to the United States through a viable private enterprise.

As can be inferred from the preceding explanation, the question of whether legislation grants some form of site specific rights is only one element in a broader issue of investment protection--or security of tenure. It is not realistic to consider this one subissue in isolation and defer sound analysis of the total question of security of tenure to a later date, as is attempted in the draft options paper. In order to make recommendations on the desirability of site specific legislation, we must simultaneously be prepared to recommend support or non-support of additional investment protection approaches, such as investment insurance, limited guarantees, assurance of grandfather rights under a treaty or creating remedies in the absence of obtaining grandfather rights.

If the Department of the Interior were required to support at this time one of the options now contained at pages 15-24 in the draft paper, we would support Option 2b (legislation which grants exclusive rights, as provided in S. 713 of the previous Congress). However, we do not believe that any of the three sub-options in support of legislation contained in the paper present a sufficiently comprehensive concept of draft legislation as to permit support one way or the other. The deficiency arises from the failure to address the question of investment protection, resulting in an inability to fairly assess each option's (a) effectiveness in encouraging continued ocean mining efforts by U.S. firms; (b) ability to attract some--even if moderate--support from industry; and (c) the corresponding stimulus to compromise that each would have on the Group of 77, particularly if strongly opposed by industry before Congress.

I would ask that the substance of the preceding comments be incorporated into the submission of this report to the President, in the event that a decision is made to proceed with the document. I wholeheartedly support the urgent reconsideration of the issues involved in deep seabed legislation by the Law of the Sea Task Force, as has been directed

by the National Security Council. The Interior Department has additional, important comments regarding the accuracy of the draft options paper; these comments are contained in an attachment to this memorandum, and I request that corresponding revisions be made.

Thomas S. Kleppe
Secretary of the Interior

Attachment

Requested Amendments to the
Draft Memorandum to the President

Page 3: Delete first sentence in the first paragraph. Interior does not support immediate enactment of legislation, since we recognize that it would be impossible to accomplish before the May session. We do support, however, a public announcement of support for prompt enactment.

Page 3: With respect to the description of Interior's position, substitute the following:

> "and Interior supports a public statement in support of enactment of legislation as soon as possible (with, as a practical matter, enactment delayed until the conclusion of the May session), including protection against interference by U.S. nationals in the recovery of minerals located in a specific area itself) and some form of protection against the impairment of prior investments under a future treaty, such as the establishment of a cause of action against the U.S. if such impairment occurs or of a Government investment insurance program of limited liability."

Specific Comments Regarding the Draft Options
Paper on Deep Seabed Mining Legislation

Pages 1-2: The section entitled "Setting" does not adequately describe the scope of the negotiating problem in Committee I. A reasonably concise, and fully agreed, explanation of this problem is found in the following excerpt from the U.S. Delegation's report from the last session:

> Implications for Future Negotiations
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> We cannot assess whether the difficulties in Committee I this session evidence an unbridgeable substantive gap, a temporary retrogression in our effort, or simply a necessary phase for the Group of 77 to let off steam. We have succeeded in keeping a generally favorable RSNT intact, but know that the Group of 77 has

developed extreme positions on all the key issues which will form the parameters of future negotiations. Even if the next session produced an improved atmosphere, conclusion of the negotiation could well require the U.S. to agree to compromises between the RSNT (which we already believe to be not fully in the ballpark) and the new Group of 77 positions on the system of exploitation, production controls and the Assembly and Council. Yet, because this session was so unproductive, we do not know how much flexibility might exist among most LDC's and therefore how close to the RSNT future negotiated compromises would come.

If the current LDC positions are moderated during the intersessional period, any members of the Group of 77 who truly seek agreement may be able to avoid being paralyzed by their own written proposals at the next session. One way of helping them to find a way out of this strait jacket, if they so desire, would be firm but gentle resistance from the industrialized countries. Under these assumptions, the LDC's might be further encouraged to make requisite compromises if this resistance were coupled somehow with the perception that time was running out for the negotiation. Such a perception may in fact be necessary if we are to avoid another stalemated session similar to this one. On the other hand, this reserve of LDC moderation desiring agreement may not genuinely exist, in which case the next session will produce no results, irrespective of our strategy.

Page 3: The importance of a treaty to our national security objectives in the oceans is highlighted, but the report fails to describe the potential for deterioration in the gains we have already made to protect these interests in the draft treaty, which may arise from protracted negotiation. Since the report on page 2 estimates that a treaty is at least two years away, the threat to our national security interests is two-pronged--damage may occur if the Conference fails to produce a treaty, but it also may occur while the treaty is being negotiated, either through expanding claims of coastal States or unraveling of compromises now contained in the Committee II and III texts. To minimize the latter risk, we must seek to expedite settlement in the deep seabed area.

Pages 6-8: As explained in the accompanying memorandum, the section on U.S. deep seabed interests does not adequately portray the economic importance of this interest, nor the problem of investment instability now facing the ocean mining industry. Language to correct these deficiencies is suggested in that memorandum.

Page 9: The introductory paragraph to Section D, "Possible Policy Approaches" should summarize the problem, which is not defined anywhere in the paper:

--Our objective remains the achievement of a comprehensive and satisfactory law of the sea treaty.

--The impasse in the deep seabed negotiations, however, requires us to consider alternative strategies for influencing Third World compromise and expediting the negotiation.

--At the same time, the lack of success in the deep seabed negotiation and unpredictability of when a treaty may be completed is generating industry claims that an interim domestic regime must be established or their continued commitment to ocean mining is impossible.

--Significant congressional support for interim ocean mining legislation is similarly growing.

Page 9: The section under "Revision of Substantive Positions" does not explain why we are recommending no change in current positions, which is that:

--Congressional attitudes demonstrate that major additional concessions may make the treaty unratifiable;

--Significant substantive concessions at this stage would in any event be tactically unwise, since they would not lead to a softening in the Group of 77's position.

Page 14: As stated previously, the Department of the Interior believes that all of the major issues in the content of legislation should be considered together, because it is the total legislative content that will govern whether the approach satisfies our dual objective of

promoting the negotiations through stimulating Group of 77 compromise and encouraging continued ocean mining work by American firms.

Page 17: As stated previously, the paper's claim to analysis of the "general type of legislation" available is inaccurate, since the fundamental question of investment protection is ignored.

Page 17: The discussion of the site specific problem is incomplete because no description of the problem from industry's or the resource manager's perspective is included. The industry's perspective is described in the covering memorandum to this attachment. The resource manager's perspective in brief is that the failure to tie rights granted to specific areas of the deep seabed makes environmental assessment, the drafting of environmental and conservation regulations and their enforcement virtually impossible to accomplish.

Page 19: A "con" to Option 2a should be included describing the environmental and conservation regulatory difficulties described above.

Page 19: The choice between non-site specific and site specific legislation is not as clear-cut as Options 2a and 2b suggest. It is possible, for example, to issue licenses which grant the licensee absolute protection against interference by persons subject to U.S. jurisdiction with the recovery of nodules within a defined area over a stated period of time. Interior supports this approach as a method of assuring some security of tenure and at the same time minimizing the risk that other nations could use our legislation as a legal basis for expanding territorial claims. In addition, legislation could attempt to resolve the site specific problem in part by requiring miners to designate the deep seabed area they intend to develop in their work plans, and then tie resource management controls to the work plan and measure possible impairment of prior investments caused by a treaty to the work plan.

Pages 20-21: The "pros" to Option 2b should include recognition that legislation similar to the Metcalf bill has a greater potential for stimulating Group of 77 compromise because it would convince developing countries that

ocean mining will occur in the absence of a treaty acceptable to the U.S. Also, it should be noted that this option has been pending in Congress since 1970 and has perhaps the highest chance of passage.

Page 21: There is absolutely no supporting evidence for the allegation that site specific legislation has "a high risk of setting off a race for deep seabed claims." The relative risks of Option 2a, 2b or modifications of each in this regard are not easily susceptible to comparison and differences may, in fact, be insignificant.

Page 22: Option 2c does not give sufficient detail as to how such an agency would operate to permit evaluation. Even yet, it must be recognized that the principal impediment to industrial development is the lack of investment protection against the risk of a bad treaty. The industry has largely succeeded in spreading other financial and technological risks through the establishment of foreign consortia.

Page 28: We disagree that the substantive views of the Department of the Interior are pronouncedly different from those of all other agencies, except perhaps in the detail of our comments.

Pages 30-31: The section describing Interior's position should be amended as follows:

The Department of the Interior does not agree that it is possible to isolate the question of site specific legislation from the broader issue of reducing present investment uncertainties arising from the treaty negotiating. Interior finds the options paper inadequate because it attempts to make this distinction and fails to establish that a principal objective for the United States in any legislative proposal is the promotion of a domestic ocean mining capability by providing some measure of protection against the risk that a future treaty will impair prior investments.

The Department of the Interior supports Option 3 regarding timing of support for legislation, provided that this option does not entail a public announcement that the Administration reserves judgment on enactment until the conclusion of the May session. Such a public

statement, in Interior's view would recall past Administrations' positions and weaken the tactical leverage on developing countries. Legislation supported by Interior would authorize immediately (a) issuance of exploration permits to serious and advanced miners, (b) protection of permittees against physical interference by U.S. nationals in specified mining areas, (d) environmental regulation of permittees, (e) data turnover by permittees.

The legislation would empower the regulating agency, if no treaty were in force in 1980, to (a) convert exploration permits to exploitation licenses and (b) promulgate detailed rules and regulations for ocean mining.

If at any time a treaty comes into force, the legislation would provide that (a) permittees or licensees who did not obtain equivalent legal rights under the treaty would have an independent cause of action against the U.S. and (b) the regulating agency be empowered to implement the provisional application of the treaty upon congressional approval and take steps to make domestic licenses subject to the treaty. Alternatively, legislation could establish a Government investment insurance program of limited liability.

Annex: Interior reserves comment on the annex until these issues are reconsidered by the Law of the Sea Task Force.